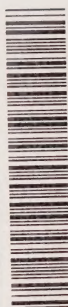


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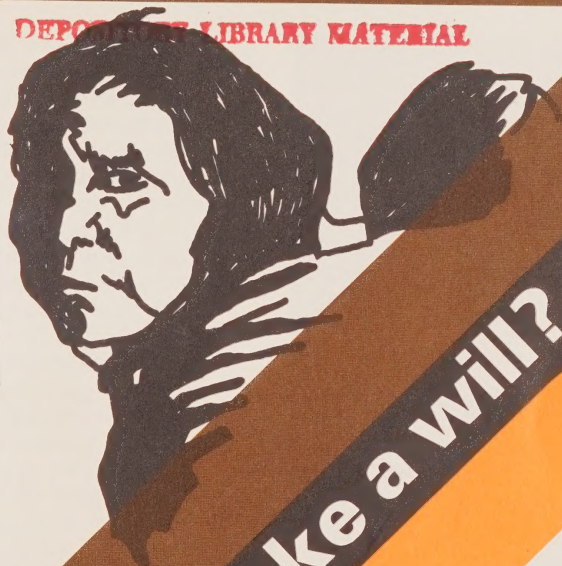
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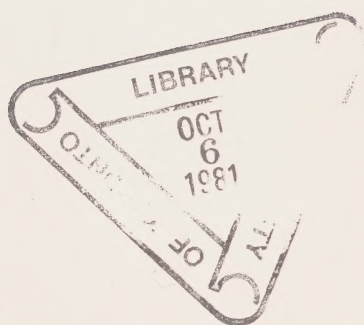


why make a will?



Indian and  
Northern Affairs  
Affaires indiennes  
et du Nord





# why make a will?

Everyone has heard that "nothing is more certain than death" Believe it, and make some plans. A Will is basic to any such plan. Nearly everyone will leave something of value, some possessions. Everyone has different feelings of obligation towards relatives and friends. The purpose of this booklet is to help you make your Will now.

Some people have the notion that making a Will is tempting fate. They put it off because they think it might be the last thing they will ever do. That is just not reasonable. In fact, having to make a Will during a final illness can be really upsetting. But if you make a Will in advance so that your family or friends will know what you want done with your estate, you will know your duty has been done.

## What is a will?

A Will is just a written statement made by an individual to make sure that his possessions or property will be given to the person or persons he wants them to go to. The law says the Will speaks for him after he has passed away. A Will should deal with all possessions; anything of value not mentioned will be subject to a different rule of law.





## **Should everyone make a will?**

Anyone who has had experience with estates will answer "Yes" to this question. If you do not make a Will, then the law will decide how your things are to be distributed. This could mean that relatives you did not wish to benefit would share in the estate. Favourite relatives would get no more than other relatives. Moreover, when there is no Will, it is often difficult to divide the possessions so that all the heirs can get their shares. For instance, no one can divide an automobile, nor can a house and lot be divided among seven children. In such cases, it may be necessary to sell the house or automobile unless the heirs are willing to sign a document agreeing that one or more of them receive the car or house. But if any one of them does not agree, then there is delay and the car or property could decrease in value while the disagreement is going on.

Persons in any of the following classes should seek advice when making a Will in view of the possible effect of other laws:

### **Persons who are separated—**

A person who is separated from his or her wife or husband should make a Will unless the assets are to pass to the separated partner.

### **Persons under the age of majority—**

In general, a person who is under the age of 18 (19 in British Columbia, Yukon, Northwest Territories, New Brunswick and Nova Scotia) cannot make a Will.

### **Aged persons and those with mental problems—**

If there is any question of mental ability to make decisions the Will could be contested on the grounds of lack of testamentary capacity.

### **Persons having large or complicated estates—**

Persons in business or who own property off-reserve.

### **Men having a common-law wife and children—**

For the most part, there appears to be no protection for a common-law wife and children, consequently it is vital that a Will be made to provide for them. If there is no Will, there is a possibility they would obtain nothing from a man's estate.

## Other reasons for making a will

By making a Will a person can make sure that the property he holds at the time of his death will be given to the person or persons of his choice. For example, an Indian may hold a farm or other land and his only heirs are a son who wishes to keep the land and a daughter living elsewhere. If he dies without a Will and the daughter claims her share, then it could become necessary to sell the property so she could receive her share in cash. By means of a Will, he could ensure that the farm would pass to the son and make other provision for his daughter.

Perhaps a person has a special friend or has raised a child who is not his child but has been like a member of the family. Unless named in a Will, such a friend or child cannot inherit anything from the estate.

## What happens to your property if you do not make a will?

Some idea of the answer is given in the above examples. When there is no Will, a person is said to have died "intestate". The Indian Act contains sections which govern the distribution of an estate in those circumstances. While the law is fair and tries to protect both the surviving wife or husband and children, it does not take into account your special wishes or plans, any special needs of the heirs, or special circumstances of your property.

## Who will look after your estate?

An executor is a person named in a Will to carry out the wishes of the person who made the Will as they are set out in the Will. A person can name anyone as his or her executor: wife or husband, an adult son or daughter, a friend or relative, a trust company or a lawyer.

This is an important item. An unwise choice could at the very least cause delay. The person named as executor should preferably be younger than the person making the Will; possess common sense and respect for your heirs; and be a person you trust.



## Know the Indian Act

The Indian Act governs the descent of property as well as possession of land on reserves. Consult the Indian Act, Sections 42 to 52 and particularly Section 48, which shows how the estate would be divided if there is no Will. See also Sections 20 to 27 regarding land on reserves.

It is important to note that all reserve land to which you are entitled to lawful possession must be registered with the Department of Indian Affairs and Northern Development. You may wish to check your Band office and the Indian Affairs office in your area to be sure that you are all agreed as to possession of property you consider to be yours. Copies of the Indian Act may be obtained free at your nearest Indian Affairs office.

## When should you make a will?

You should make your Will now when you are sound mentally and physically. In too many cases people have delayed making their Wills until so late in life that there might be a question as to whether or not they were really able to do so properly. If this question arose, it could cause serious delays in the administration of the estate and could even result in the Will not being approved, with the result that it might be declared to be of no account at all.

## Who should help you to make your will?

Any person should be able to make his or her own Will. There is no legal requirement that a Will be prepared by a lawyer, but by law there are certain requirements for making a Will. In order to make a Will which will avoid mistakes and express your wishes clearly, if you have a large or complicated estate, it would be a good idea to have experienced assistance. A lawyer or notary would help you avoid mistakes of a legal nature. However, many lawyers are unfamiliar with Indian reserves and, for this reason, it might be wise to ask the assistance of the nearest Indian Affairs or Band office. They could assist in the wording of your wishes and could provide the correct legal description of any parcels of land you wish to mention in the Will.





## Are will forms available?

To encourage and assist Indian people in making Wills, the Department provides Will forms which can be obtained from the District Office. Local Band offices or Indian Affairs officials will be pleased to supply such forms and, if you wish, assist you in completing the form as your Will.

The form may be suitable and serve the purpose in most cases, but if there are special circumstances, such as questions about a common-law wife or husband, or real estate off the reserve, or a business, then a lawyer or notary should be consulted to prepare a Will suitable to your own special needs.

In some towns and cities there are stores dealing in legal supplies and forms. A standard Will form can be bought from such stores.



## The will form and advice about using it

### Sample of Will

A copy of the Will form is shown as the last page of this booklet. The form has been filled in as an example of a possible way to complete it. Each individual should complete one to meet his own wishes and circumstances.

### Description of Land

It is important that both property and beneficiaries be properly described so as to be easily identified. For example, if you have a Certificate of Possession for your land, you could describe your property as it is shown on the Certificate. Moreover, it is advisable to give full names of beneficiaries and their relationship, if any, to you.

### Extra Pages of Will

If there are more items to be listed than can be placed on the Will form, and it is necessary to use an additional page or pages, the person making the Will and the two witnesses should sign their names on the lower righthand corner of each of the additional pages of the Will. This might prevent anyone at a later date from substituting some of the pages.

### **Sketch When Dividing Land**

If a parcel of land is to be divided among a number of heirs and each is to get a separate portion, it is important, if at all possible, to attach to the Will a precise sketch showing the portions passing to each heir and showing measurements. This should also have the date of the Will and the signatures of the person making the Will and the two witnesses. A good sketch or drawing can avoid much delay when the estate is being settled.

### **Corrections in Will**

Any changes or corrections in the Will should be initialled by the "testator" (the person making the Will), and by the two witnesses at the time the changes are made. As such an altered Will could be questioned, the best thing to do would be to retype or rewrite the page before it is signed.

### **Careful Description**

If a person making a Will wishes to give a certain item or article or a fixed sum of money to a relative, friend or charity, the article or amount should be described clearly so there will be no doubt in the mind of the Executor. For example:

1. I give to my daughter, Patricia Brown, the sum of \$5000.00;
2. I give to my nephew, Harry Eagle, my painting entitled "Autumn Leaves" by Tom Thomson.

### **Residue of Estate**

It is most important that Item 3 of the Will form be completed. In this way, you tell what you want done with all your property which has not been listed under Item 2 of the form. This would include property you cannot remember or think of at the time you are making the Will. If Item 3 is not completed any of your property which is not disposed of under Item 2 would be distributed as if you had not made a Will. There is almost always some item which the testator has overlooked.



## Can your will be changed?

You may change your Will at any time. Even if you wish to make only slight changes in your Will, it is advisable that you do so by making an entirely new Will. Moreover, if you have a Will now it is a good idea to review it from time to time, because you may find that circumstances have changed. For example, one of the beneficiaries under your Will may have died, or you may have acquired additional property, or possibly you got married or remarried. As a result of your review, you may wish to make a new Will.

## What if you cannot obtain advice and do not have a will form?

Under the present Indian Act, the Minister may accept as a Will any written "instrument" (document) signed by an Indian in which he indicates his wishes or intentions with respect to the distribution of his property upon his death. The Minister cannot approve an instrument which is not signed by the person who made the Will. The signature must be at the foot or end of the document and should be witnessed by two adult persons who are both with the person at the time he is making the Will. Then both witnesses must sign the document at that time in the presence of each other and the person making the Will. Be sure to have witnesses who are not going to benefit from the Will. Do not have the husband or wife of such a beneficiary act as a witness, either. In law, if a benefi-

ciary signs a Will as a witness, then he cannot receive whatever is willed to him.



## How to safeguard your will

After the Will has been completed, signed, witnessed, and dated, it becomes a valuable document. Unless it is kept in a safe place, it may be lost or even destroyed by accident, such as fire. If hidden away, it may not be available when it is needed.

Generally speaking, an Indian has three choices for the keeping of his Will:

1. It may be forwarded to the Regional Director, Reserves and Trusts, at your Regional Office of the Department of Indian Affairs and Northern Development for safekeeping;
2. It may be placed in a safety deposit box in a Bank; or
3. It can be kept in his house.



This is the Last Will of me, John Eagle

No. 381 Nahanni Band, of the Western

Indian Agency, Province of British Columbia

I hereby revoke all former wills at any time made by me.

1. I direct that all my just debts, funeral and testamentary expenses be paid as soon as conveniently may be after my decease.

2. I give the property of which I die possessed as follows:

(a) To my daughter, Patricia Brown, the sum of \$500.00;

(b) To my wife, Louise Eagle, the whole of Parcel B, Lot 27, Concession 4, Nahanni Reserve No. 2, in the Province of British Columbia, shown on Plan No. 52693, Canada Lands Survey Records, the house thereon, and all household effects.

3. All of my property not hereinbefore disposed of I give to:

My wife, Louise Eagle

4. I appoint my wife, Louise Eagle

to be the Executor of this my will.

In witness whereof I have hereunto set my hand this 4th day of November 19 74.

Signed by the Testat(or)(rix) in the presence of us both, present at the same time, who at his/her request and in his/her presence have subscribed our names as witnesses.

John Eagle  
Signature of Testat(or)(rix)

1. Elizabeth Jones  
(Signature of Witness)

Elizabeth Jones  
(Print name of Witness)

2. Daniel Jackson  
(Signature of Witness)

Daniel Jackson  
(Print name of Witness)

Housewife  
(Occupation)

Nahanni Indian Reserve  
(Address)

Band Councillor  
(Occupation)

Nahanni Indian Reserve  
(Address)



- 2 -

One of I, Daniel Jackson of Nahanni Reserve, in the  
 Witnesses Province of British Columbia, Band Council/lor make oath and say:  
 to complete (Occupation)

Affidavit 1. That I know John Eagle of Western  
 Indian Agency.  
 2. That on or about the 4th day of November A.D. 1974  
 I was personally present and did see the paper writing on the reverse hereof signed by John Eagle  
John Eagle as the same now appears and as and for his/her  
 last will and that the same was so signed by the said John Eagle  
 in the presence of me and of Elizabeth Jones who were  
 both present at the same time, whereupon the said Elizabeth Jones  
 and I did at the request of the said John Eagle and in  
 his/her presence attest and subscribe to the said Will.

Sworn before me at Vernon in the  
 Province of British Columbia this  
6th day of November A.D. 1974

Daniel Jackson  
 (Signature of Witness)

.....  
 Signature of Indian Superintendent, Notary, Commissioner, etc.

## NOTE: EXECUTION BY MARK:

Where the will is signed by mark the following should be added to the attestation clause to be signed by the witnesses:

"the said will having been first truly and audibly read over to him/her, when he/she appeared to understand it, and made his/her mark hereto in our presence as aforesaid."

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